# Congress of the United States

Washington, D.C. 20515

May 12, 2022

Delivered via Email

The Honorable Jennifer Abruzzo
General Counsel
National Labor Relations Board
1015 Half Street, SE
Washington, D.C. 20570-0001

Dear Ms. Abruzzo:

We write regarding a petition filed by one of the regional offices under your supervision on behalf of the National Labor Relations Board (NLRB or "the Board") seeking to reinstate immediately Gerald Bryson, a discharged Amazon employee, to his former position, and pleading for other injunctive relief under Section 10(j) of the National Labor Relations Act (NLRA).[1] We found the petition disturbing in many respects, not least in the manner to which it excludes relevant factual information. Incontrovertible evidence documents Mr. Bryson hurling a number of sexually charged, degrading obscenities at a female coworker on the picket line prior to his termination. For the NLRB to characterize such bigotry as protected concerted activity under Section 7 of the NLRA demonstrates gross ignorance of federal civil rights law. We are also concerned the Board's filing of the petition a week before a union election at Amazon's Staten Island warehouse was an attempt to influence unduly the outcome of the election.

On April 6, 2020, while protesting outside an Amazon fulfillment center in Staten Island (hereinafter "JFK8"), Mr. Bryson participated in a verbal altercation with a female coworker. The altercation consisted of Mr. Bryson hurling misogynistic and sexist epithets. Mr. Bryson accused the female coworker of "selling herself for two dollars" and referred to her as a "gutter bitch" and a "crack ho." Despite a pause in which the female coworker refused to continue engaging, Mr. Bryson continued to urge her to "get off the fentanyl," that she "need to be tested" and was "disgusting." The bigotry of Mr. Bryson's comments also extended to calling his female coworker "ignorant and stupid" as well as a "crack-head ass" and "queen of the swamp." Mr. Bryson hurled all these slurs through a loudspeaker, amplifying these epithets throughout the parking lot so as to magnify his coworker's humiliation. A video documenting the behavior soon became available for public consumption on Facebook.[2]

The conduct described is unacceptable in any modern workplace. Mr. Bryson, by hurling these epithets in a public forum via a loudspeaker so as to isolate and humiliate his female coworker, may have created a hostile, abusive work environment prohibited by Title VII of the Civil Rights Act of 1964. As stated

[1] National Labor Relations Board v. Amazon.com Services LLC, No. 1:22-cv-01479 (EDNY 2022) (petition of Kathy Drew King, Regional Director of Region 29, on and behalf of the National Labor Relations Board).
[2] https://www.facebook.com/bella.nagengast/videos/1079803845739201.

both by requisite case law and an amicus brief submitted by the Equal Employment Opportunity Commission (EEOC), "an employer is liable for the hostile work environment created by a coworker if the employer failed to act reasonably to prevent harassment or to correct harassment about which it knew or should have known."[3] Relevant case law makes clear that an employer is liable for the harassing conduct of its employees if it fails to protect employees from predatory workers.[4] Employers also bear the obligation of preventing and correcting harassment in the workplace that has not yet risen to the level of pervasive hostility, with EEOC regulations imposing on employers a similar obligation to "take all steps necessary to prevent sexual harassment from occurring" including the imposition of "appropriate sanctions."[5] JFK8 was well within its rights to sanction Mr. Bryson for his abhorrent, bigoted behavior, as failure to take such corrective action may have led to legal liability. For the NLRB to assert in its petition that Mr. Bryson's appalling, sexist behavior qualifies as protected activity requiring immediate reinstatement demonstrates severely misplaced priorities.

Judge Millett, an Obama appointee on the D.C. Circuit, rebuked the NLRB for similar actions, condemning the "cavalier and enabling approach that the Board's decisions have taken toward the sexually and racially demeaning misconduct" of employees during strikes.[6] Judge Millett also alluded to the Board's history of permitting "sexually and racially disparaging conduct that… encapsulates the very type of demeaning and degrading messages that for too much of our history have trapped women and minorities in a second-class workplace status."[7] The concurring opinion also admonished Board decisions that had continually "given short shrift to gender targeted behavior, the message of which is calculated to be sexually derogatory and demeaning" while noting the obvious—that "[s]uch language and behavior [has] nothing to do with attempted persuasion about the striker's cause."[8]

In response to these longstanding concerns, the NLRB issued a decision reversing the Board's disturbing trend of conflating sexually and racially demeaning behavior with protected union activity. In General Motors, the Board disagreed with the "flawed principle that Section 7 activity is analytically inseparable from abusive conduct committed in the course of Section 7 activity."[9] Such a standard conflicted with employers' duty to comply with antidiscrimination laws to the point of being "wholly indifferent to employers' legal obligations to prevent hostile work environments on the basis of protected traits."[10] To rectify this flaw, the NLRB applied a burden-shifting framework "for cases where the General Counsel alleges that discipline was motivated by Section 7 activity, and the employer asserts that it was motivated by abusive conduct," with the General Counsel required to establish, with sufficient evidence, "a causal relationship between the discipline and the Section 7 activity."[11] In doing so, the Board made clear that the NLRA "offers no specific protection for abusive conduct" and honored "the employer's

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[3] Brief of the Equal Employment Opportunity as Amicus Curiae in General Motors LLC, 369 NLRB No. 127 (2020); see also Vance v. Ball State Univ., 570 U.S. 421, 424, 427 (2013) (holding that an employer is liable for the harassing behavior of an employee's co-worker if it was negligent in controlling working conditions).
[4] See Doe v. Oberweis Dairy, 456 F.3d 704, 716 (7th Cir. 2006) (holding that an employer is liable for the harassing conduct of a coworker employee if it "failed to have and enforce a reasonable policy for harassment").
[5] 29 C.F.R. § 1604.11(f)
[6] Consolidated Communications, Inc. v. NLRB, 837 F.3d 1, 21-24 (D.C. Cir. 2016) (Millet, J. concurring).
[7] Ibid. at 21.
[8] Ibid. at 21-22.
[9] General Motors, 369 at *15.
[10] Ibid. at *11.
[11] Ibid. at *15-*16.

right to maintain order and respect" while ensuring "employees' Section 7 rights continue to be protected."[12] By directly contradicting its own precedent, the Board ignores Judge Millet's admonitions and "signals that, when push comes to shove, discriminatory and degrading stereotypes can still be a legitimate weapon in economic disputes."[13]

Moreover, the timing of this suit, a mere week before a union election was held at JFK8, indicates that the Board attempted to influence unduly the election's outcome. The purpose of injunctive remedies under Section 10(j), as stated in your own memo, is to "ensure that employees' rights will be adequately protected from remedial failure due to passage of time."[14] Yet, 23 months have elapsed since Mr. Byson's public display of bigotry, and your office has only now filed the injunction in federal court. The NLRB is required by federal law to conduct union representation elections "'under conditions as nearly ideal as possible'—so called laboratory conditions—in order to provide employees the opportunity to express their uninhibited desires regarding representation."[15] By filing this petition seeking reinstatement of Mr. Bryson and alleging a litany of employer misconduct a mere week before voting begins, the NLRB has jeopardized the neutral laboratory conditions necessary for an impartial election.

The decision of your office to pursue this petition shows a blatant disregard for the rights of employees to engage in a workplace free from harassment and discrimination. The NLRB's obvious attempt to contravene recent Board precedent by filing the petition runs the risk that employers will now be forced to violate federal antidiscrimination laws to avoid unfair labor practice liability. President Biden's pronouncement in a recent speech before the National Building Trades Union of "Amazon, here we come" further cements our concern that the NLRB will be employed as a weapon of intimidation to impose unionization, rather than protect workers' rights of free association.[16] Therefore, in accordance with assurances you gave during your confirmation process that you will be fully compliant with all oversight requests, we require the following information by May 23, 2022. When responding, please include a response to each question below, rather than in a narrative format.

1. At what point were you and Kathy Drew King, the Regional Director for Region 29, made aware of Mr. Bryson's harassing conduct?

2. Part of the duty of the Office of the General Counsel, and indeed of any attorney as an officer of the court, is to be transparent with any forum or tribunal in disclosing requisite facts and case law, even those not advantageous to the attorney's position. To that end, regarding the petition filed by the Regional Director of Region 29 in the Eastern District of New York:[17]

    a. Why was no reference made to Mr. Bryson's misogynistic rhetoric or any of the sexually degrading epithets hurled at a coworker outside of the JFK8 warehouse?

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[12] Ibid. at *16.
[13] Consolidated Communications, 837 F.3d at 22.
[14] Memorandum GC 21-05, "Utilization of Section 10(j) Proceedings". Office of the General Counsel. August 19, 2021.
[15] Professional Transp., Inc., 370 NLRB No. 132, at *2 (2021).
[16] https://mobile.twitter.com/kenklippenstein/status/1511763627325415432
[17] National Labor Relations Board v. Amazon.com Services LLC, No. 1:22-cv-01479 (EDNY 2022) (petition of Kathy Drew King, Regional Director of Region 29, on and behalf of the National Labor Relations Board).

b. Why was there no reference made within the petition to In re General Motors, a binding Board decision that separated abusive, prejudiced employee conduct from Section 7 protected activity and mandated application of a burden-shifting framework to cases involving abusive conduct?

c. Why was there no attendant analysis applying the Wright Line burden-shifting framework mandated by In re General Motors, particularly as to the requirement that the General Counsel must prove "the employer had animus against the Section 7 activity" and establish "a causal relationship between the discipline and the Section 7 activity"?

3. How is the failure to conduct this analysis in the petition not a professional and ethical dereliction on the part of the General Counsel's office?

4. Based on the pleading, it appears there was no action on this case from May 2021, when witness testimony was last taken in the trial before an Administrative Law Judge, to March 17, 2022, when the petition requesting Mr. Bryson's reinstatement was filed in federal court. Is that correct? If so, why was there no action taken during this time?

5. Why did the Board opt to file this petition a mere week before a union election was to be held at the facility despite this incident having occurred in April of 2020, and did the Board consider the implications of such an action, and its potential to interfere with the then-pending election?

6. Please provide all communication between your office and the Region 29 office related to the Amazon Staten Island election.

Thank you for your attention to this matter.

Sincerely,

Richard Burr
Ranking Member
Senate Committee on Health, Education, Labor and Pensions

Virginia Foxx
Ranking Member
House Committee on Education and Labor

Mike Braun
Ranking Member
Subcommittee on Employment and Workplace Safety

Rick W. Allen
Ranking Member
Subcommittee on Health, Employment, Labor and Pensions